(1913) 228 U. S. 459, which held that the trustee had no rights in policies upon which the insured bankrupt had secured loans to the full amount of their cash surrender value.

To the advocates of strict interpretation this decision may well seem a perversion of the obvious meaning of the Act. Moreover, the line of reasoning adopted by the Court of necessity forces it to find the trustee's sole grant of power in the proviso of § 70a (5), and thus give to this exception the force of additional legislation denied to it in *Holden* v. *Stratton*. But, questions of interpretation aside, the result reached in the principal case is salutary, and constitutes a notable instance of the adoption of the construction of a statute conformable to the interests of the community.

BURDEN OF PROOF IN RECOVERING PROFITS.—In an equitable action by a patentee against an infringer, it is indisputably within the power of the court to allow recovery by the complainant of all the profits accruing to the infringer through his invasion of the patentee's right.[1] Theoretically, this remedy meets the demands of justice, and there is no doubt of its practicability when the patented article or process is new, and all the profits received are due solely to the infringement. But where profits arise partially from other elements, the application of the remedy grows troublesome. For instance, if other articles or processes were available at the time the patent was appropriated, the measure of profits recoverable is the advantage gained by the use of the patented article or process as compared with such others.[2] And when the patent is for an improvement in an article or process in common use, or if the infringer used the patented article or process in connection with other elements, he is liable only for the profits derived from the use of the improvement or patented element.[3]

The question naturally arises on whom is to rest the burden of apportioning such profits. Where the patent is for an improvement the general rule is that the burden is on the complainant to prove the existence of profits, and the exact proportion of them due to his patented feature, or else to prove that the entire value or salability

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tion and the adjudication did not affect the right of the insured's personal representative to redeem by payment of the policy's cash surrender value at the date of the filing of the petition.

[1]Though sanctioned by statute in the United States since 1870, Rev. Stat. § 4921, this remedy existed previously in equity by force of judicial decision. 3 Robinson, Patents § 1137. Profits and damages may be recovered in the same action. Fox *v.* Knickerbocker Engraving Co. (C. C. 1905) 140 Fed. 714. The existence of actual profits in a commercial sense is unnecessary to a recovery, so long as any advantage or saving has resulted from the use of the patented article or process. Cawood Patent (1876) 94 U. S. 695.

[2]Columbia Wire Co. *v.* Kokomo Steel & Wire Co. (C. C. A. 1911) 194 Fed. 108; Mowry *v.* Whitney (1871) 14 Wall. 620, 648. It has been held however, that the comparison must be between the patented invention and what was known and open to the public at and before the date of the patent. Turrill *v.* Ill. Centr. Ry. (C. C. 1880) 20 Fed. 912.

[3]Brown *v.* Lanyon Zinc Co. (C. C. A. 1910) 179 Fed. 309; Sessions *v.* Romadka (1891) 145 U. S. 29, 45; 11 COLUMBIA LAW REVIEW 74.

of the process or article was due to the patented improvement.[4] When the patent is for an entire device or process, after the plaintiff has proved the existence of profits, he may recover the entire amount unless the defendant produces evidence proving the use of other elements in connection with the patented device, and showing that such elements probably contributed to the profits received.[5] The burden then shifts again to the plaintiff to segregate the profits due him.[6]

The application of these rules virtually denies to a patentee the long established right to recover profits.[7] The only reliable evidence, which can be introduced to support the burden of proof thus thrust upon the complainant, is invariably in the possession of the defendant, who may defeat recovery of profits by refusing to produce such evidence, or by failing to keep books or accounts of the infringing transaction, or by adding so many elements of his own to the patented device that the difficulty of apportioning the profits becomes insurmountable.[8] The tendency of the later decisions, however, has been to permit recovery by the complainant of the entire profits, if he proves that profits existed, and that it is impossible, for any of the above reasons for him to segregate the exact amount of profits due him, applying to the infringer the rule applicable to a trustee *ex maleficio*.[9]

The doctrine of these cases is mentioned with approval in the recent case of *Schmertz Wire Glass Co.* v. *Western Glass Co.* (D. C. N. D. Ill. 1913) 204 Fed. 1006. Though it greatly modifies the rule of the earlier cases,[10] its effect is undoubtedly to promote justice.[11] In cases of infringement of copyrights the complainant is allowed to recover the entire profits of the infringement, on the ground that it is impossible to distinguish what proportion of the value of a book is due to the pirated portion;[12] and a similar rule is applied at law in

[4]Garretson *v.* Clark (1883) 111 U. S. 120; Elgin Wind Power & Pump Co. *v.* Nichols (C. C. A. 1901) 105 Fed. 780; Westinghouse *v.* New York Air Brake Co. (C. C. A. 1905) 140 Fed. 545; American etc. Co. *v.* St. Louis etc. Co. (C. C. A. 1911) 192 Fed 121; see Yesbera *v.* Hardesty Mfg. Co. (C. C. A. 1908) 166 Fed. 120.

[5]Elizabeth *v.* Pavement Co. (1877) 97 U. S. 126, 141; Orr & Lockett Hardware Co. *v.* Murray (C. C. A. 1908) 163 Fed. 54; Tuttle *v.* Claflin (C. C. A. 1896) 76 Fed. 227; see McSherry Mfg. Co. *v.* Dowagiac Mfg. Co. (C. C. A. 1908) 160 Fed. 948.

[6]See Canda Bros. *v.* Michigan Malleable Iron Co. (C. C. A. 1907) 152 Fed. 178.

[7]10 COLUMBIA LAW REVIEW 647; 1 Hopkins, Patents 593.

[8]Some of the earlier cases sought to prevent this by resolving every doubt or inference against an infringer attempting to prevent recovery by such means. Rubber Co. *v.* Goodyear (1869) 9 Wall. 788; National Car-Brake Shoe Co. *v.* Terre Haute Car and Mfg. Co. (C. C. 1884) 19 Fed. 514.

[9]Westinghouse Co. *v.* Wagner Mfg. Co. (1911) 225 U. S. 604; Roth *v.* Harris (D. C. 1912) 197 Fed. 929; Dowagiac Mfg. Co. *v.* Superior Drill Co. (C. C. A. 1908) 162 Fed. 479.

[10]Its effect in most cases is to throw the burden of proof of apportionment upon the defendant. See Westinghouse Co. *v.* Wagner Mfg. Co., *supra*.

[11]With the possible exception of the case where the patented feature is of an insignificant part of the article or process. See Wales *v.* Waterbury Mfg. Co. (C. C. A. 1900) 101 Fed. 126.

[12]Callaghan *v.* Myers (1888) 128 U. S. 617, 665.

cases of wilful and wrongful confusion of goods, where the burden rests on the wrongdoer to prove what portion of the entire mass belongs to him.[13] An infringer of a patent right is not a trustee of resulting profits,[14] but where equity takes jurisdiction of an action for infringement, it views the infringer as a trustee for purposes of applying a remedy, depriving him of his unlawful gains and bestowing them upon the injured patentee.[15] It should logically, then, apply to the case of the infringer the same rules of evidence as to that of the trustee, and, where there has been an intermingling by the infringer of profits lawfully and unlawfully acquired, it should place upon him the burden of proving what proportion of such profits were rightfully gained.[16]

CONFUSION OF GOODS.—At common law one who wilfully suppressed or destroyed evidence became subject to the maxim, *Omnia praesumuntur contra spoliatorem,* which justified a court in drawing the most unfavorable conclusion as to the effect of such evidence. It is clear that when a confuser makes the delineation of title and the extent of a loss extremely difficult to ascertain, he can gain no advantage from his own wrong, and must bear the burden of any inconvenience entailed by the confusion.[1] The earliest authorities are quite in accord with this view in declaring that one who, with an improper motive, confuses his goods with those of another so as to render the individual portions indistinguishable, must forfeit his own to the passive party without any accounting. No differential test based on the nature of the property was here involved.[2] But the courts soon realized that even though the individual portions of a confused mass cannot be distinguished, or practicably be separated, if both are of the same substance and quality each owner may recover what is practically, though not identically, his own by regaining a portion of the mass equal to the quantity contributed by him. If, therefore, the individual quantities are known,[3] there is no such difficulty in determining the extent of the injured party's property in the mass, as to

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[13]See The Idaho (1876) 93 U. S. 575.

[14]Courts of equity will not take jurisdiction of actions for infringement of patent rights solely on the ground that the infringer is a trustee. Root *v.* Ry. (1881) 105 U. S. 189.

[15]3 Robinson, Patents § 1137; see Tilgham *v.* Proctor (1887) 125 U. S. 136, 145.

[16]Smith *v.* Motley (1906) 150 Fed. 266; Hart *v.* Ten Eyck (N. Y. 1816) 2 Johns Ch. *62, *108; see National Bank *v.* Ins. Co. (1881) 104 U. S. 54, 66 *et seq.*

[1]Lupton *v.* White (1808) 15 Ves. 432, 439; see Bethel *v.* Linn (1886) 63 Mich. 464; Holloway Seed Co. *v.* Nat. Bk. (1898) 92 Tex. 187. The same principle is applied to confusion of accounts. See Stone *v.* Marshall Oil Co. (1904) 208 Pa. 85.

[2]Anonymous (1594) Popham 38; Warde *v.* Aeyre (1615) 2 Bulst. 323; 2 Bl. Comm.* 405; *cf.* Stephenson *v.* Little (1862) 10 Mich. 433; see Beach *v.* Schmultz (1858) 20 Ill. 186.

[3]If, a reasonable doubt exists as to the quantity belonging to each it is resolved against the party at fault. Osborne *v.* Cargill Elev. Co. (1895) 62 Minn. 400.